

# Supplemental Response to Comments

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Submitted by Northwest Environmental  
Advocates (NWEA) as They Pertain to the Use  
of Historic Fish Consumption Rates in  
Deriving Human Health Water Quality  
Criteria for Toxics in Oregon

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# Supplemental Response to Comments

## Submitted by Northwest Environmental Advocates (NWEA) as They Pertain to the Use of Historic Fish Consumption Rates in Deriving Human Health Water Quality Criteria for Toxics in Oregon

### I. BACKGROUND

On July 8, 2004, the Oregon Department of Environmental Quality (ODEQ or the “Department”) submitted new and revised water quality standards<sup>1</sup> to the U.S. Environmental Protection Agency (EPA or the “Agency”) for review and approval. These new and revised water quality standards were adopted by the Oregon Environmental Quality Commission (OEQC or the “Commission”) on May 20, 2004. Oregon’s water quality standards are located in Chapter 340, Division 41, of Oregon’s Administrative Rules (OAR 340-041).

New and revised numeric human health water quality criteria for toxics were included in Oregon’s 2004 water quality standards submission. The human health criteria for 105 toxic pollutants were adopted by Oregon, most of which were derived using the methodology presented in EPA’s 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (hereinafter referred to as the “2000 Human Health Methodology”).<sup>2</sup> One of the variables included in this methodology is an exposure variable referred to as the fish consumption rate. In deriving its new and revised human health criteria, Oregon utilized a fish consumption rate of 17.5 grams per day.

The fish consumption rate of 17.5 grams per day represents the 90<sup>th</sup> percentile of freshwater and estuarine finfish and shellfish consumption data collected from the 1994-1996 *Continuing Survey of Food Intake by Individuals* conducted by the U.S. Department of Agriculture.<sup>3</sup> EPA’s 2000 Human Health Methodology provides guidance for selecting an appropriate fish consumption rate variable for use in calculating criteria. A rate of 17.5 grams per day is provided as the national default value to protect the general U.S. adult population. This value is recommended if no information is available regarding local or regional consumption levels.

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<sup>1</sup> ODEQ. 2004. Letter dated July 8, 2004, with two attachments, from Stephanie Hallock, Administrator, Oregon Department of Environmental Quality, Portland, Oregon, to John Iani, Administrator, U.S. Environmental Protection Agency, Region 10, Seattle, Washington.

<sup>2</sup> EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004. Available at: <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf>

<sup>3</sup> See: Pages 4-24 to 4-25; EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA 822-B-00-004.

Since 2003, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR or the “Umatilla Tribe”) and others<sup>4</sup> have raised concerns regarding the protectiveness of Oregon's new and revised human health criteria for populations that are known to consume fish at a rate higher than 17.5 grams per day. Populations with fish consumption exposure rates significantly higher than 17.5 grams per day have been identified through the completion of a high-quality, EPA-funded fish consumption survey conducted by the Columbia River Inter-Tribal Fish Commission (CRITFC). This survey was entitled *A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs of the Columbia River Basin*,<sup>5</sup> and included data from the Umatilla Tribe and the Confederated Tribes of the Warm Springs Indian Reservation (Warm Springs Tribe), both located in Oregon. (The Nez Perce Tribe is located in Idaho and the Confederated Tribes and Bands of the Yakama Indian Nation is located in Washington).

Subsequent to its July 8, 2004, water quality standards submittal, Oregon initiated an extensive review of the 17.5 grams per day fish consumption rate used in the 2004 human health criteria. This review, referred to as the Oregon Fish Consumption Rate Review Project, assessed the quality of the fish consumption data available from the CRITFC survey and other regional surveys. Based on the findings of this review, on October 23, 2008, the OEQC directed ODEQ to pursue rulemaking to revise Oregon's 2004 human health toxics criteria using a fish consumption rate of 175 grams per day.<sup>6</sup>

## **II. COMMENT**

In May, July, and October of 2007, Northwest Environmental Advocates (NWEA) submitted comments to Oregon and others regarding several aspects of the Oregon Fish Consumption Rate Review Project.<sup>7,8,9</sup> As part of the comments, NWEA asserted that the State of Oregon has the responsibility to honor tribal treaty rights in setting water quality standards and should do so by utilizing a fish consumption rate reflective of the tribal consumption rate at the time tribal treaties were signed.

The commenter's rationale for utilizing a fish consumption rate that reflects historic levels of fish consumption is that the treaty Indian tribes (e.g., Columbia River Tribes, including the Umatilla,

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<sup>4</sup> From 2003 through 2008, ODEQ and EPA has received letters from the Columbia River Inter-Tribal Fish Commission, Center for Tribal Water Advocacy, Northwest Environmental Advocates, and several Tribes (in addition to the Umatilla Tribe) located in Oregon and Idaho. Please refer to the Administrative Record supporting EPA's action on the new and revised human health criteria adopted by Oregon in 2004 for copies of these letters.

<sup>5</sup> CRITFC. 1994. *A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs of the Columbia River Basin*. Columbia River Inter-Tribal Fish Commission, Portland, Oregon. Technical Report 94-3. Available at: <http://www.critfc.org/tech/94-3report.pdf>.

<sup>6</sup> OEQC. 2008. *Oregon Environmental Quality Commission Meeting, Minutes of the Three Hundred and Forty-sixth Meeting, October 23, 2008*. Oregon Environmental Quality Commission, Portland, Oregon. Available at: <http://www.deq.state.or.us/about/eqc/minutes/2008/2008octEQCMinutes.htm>.

<sup>7</sup> Bell, Nina. May 15, 2007. Memorandum to Oregon Fish Consumption Rate Project Participants Regarding “Policy Questions Underlying Commission Decision on Fish Consumption Levels.” Northwest Environmental Advocates.

<sup>8</sup> Bell, Nina. July 13, 2007. Letter to Stephanie Hallock (ODEQ), Rick George (Umatilla Tribe), and Mike Gearheard (EPA, Region 10) Regarding “Oregon Fish Consumption Rate Project.” Northwest Environmental Advocates.

<sup>9</sup> Bell, Nina. October 15, 2007. Letter to Members of the EQC Regarding “Oregon Fish and Shellfish Consumption Rate Project: October 17 Special Commission Meeting.” Northwest Environmental Advocates.

Warm Springs, Nez Perce, and Yakama) have a right to take significant quantities of fish pursuant to their treaties, and therefore, Oregon has a duty to protect the health of those treaty fishers by setting water quality criteria based on the level of fish consumption that tribes exercised when the treaties were signed. NWEA also stated that today's current rates of fish consumption are not adequately representative of the historic levels of fish consumption that are protected by the tribal treaties. NWEA asserts that today's current consumption rates are depressed and that, as fish become cleaner and healthier, fish consumption is likely to increase.

### **III. EPA RESPONSE**

#### ***A. The Trust Responsibility Does Not Expand EPA's Authority Beyond the CWA Requirements***

##### **1. EPA's CWA Requirements for States and Authorized Tribes**

Under the Clean Water Act (CWA), § 303(c), EPA is to review and to approve or disapprove state<sup>10</sup>-adopted water quality standards. EPA's CWA implementing regulations for the water quality standards program found in the *Code of Federal Regulations* (CFR) at 40 CFR Part 131 provides that, among other things, uses be consistent with the requirements of the CWA (40 CFR § 131.5(a)(1)) and that the criteria protect the designated uses (40 CFR § 131.5(a)(2)) and are based on sound scientific rationale (40 CFR § 131.11(a)). Furthermore, 40 CFR § 131.10(h) (1) provides that states may not remove designated uses if they are existing uses. 40 CFR § 131.3(e) defines existing uses as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."

Oregon's human health criteria were developed to protect Oregon's uses of public domestic water supply, private domestic water supply, and fishing. In order to ensure protection of the existing uses, the criteria need to protect the level of use which occurred on or after November 28, 1975. The CWA does not require that uses be protected at levels present any time prior to November 28, 1975, including at the time the US signed treaties with the Columbia Basin tribes in 1855. Oregon has the discretion to set human health criteria for toxics based upon a fish consumption rate that is representative of consumption rates at the time of treaty signing, but EPA cannot require Oregon do this under the CWA.

##### **2. The Federal Trust Responsibility**

As a federal agency, EPA has a general trust relationship with federally recognized tribes in Oregon. The general federal trust responsibility arises from the historical relations between federally recognized Indian tribes and the United States, as established through treaties, federal statutes, executive orders, and court decisions. *EPA's Policy for the Administration of*

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<sup>10</sup> Under 40 CFR § 131.3(j), States include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of administering the water quality standards program.

*Environmental Programs on Indian Reservations* (1984 Indian Policy)<sup>11</sup> recognizes this special relationship, and states that EPA, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.

While the precise legal contours of the federal trust responsibility have not been fully defined, the trust responsibility informs federal policy and provides that the federal government consider the interests of the tribes when taking actions that may affect them or their resources. Courts have not required particular procedures, but generally have inquired to see whether federal agencies have sought the views of tribes and considered their interests.

In a series of decisions, courts have ruled that statutes, regulations, treaties, and executive orders define the contours of the United States' fiduciary responsibilities.<sup>12</sup> Statutes may limit or expand the obligations of the United States as trustee, and may require more or less than would be required of a trustee under private trust law.<sup>13</sup> The Supreme Court has recently reaffirmed these views of the trust responsibility that "a tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'"<sup>14</sup> Applying these Supreme Court principles, appellate courts have found that "unless there is a specific duty that has been placed on the government with respect to Indians, this [trust] responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."<sup>15</sup>

In some cases, specific obligations may be mandated by treaty. For example, treaties applicable to many tribes in the Pacific Northwest, including the Columbia River basin, include a provision that guarantees the right to fish: "The right of taking fish at all usual and accustomed places in common with citizens of the Territory . . ."<sup>16</sup> This phrase has been interpreted numerous times by courts to guarantee the right to fish and to share equally in the amount of fish, but has never been found to address water quality.<sup>17</sup>

The United State District Court for the Western District of Washington ruled that the State of Washington has a duty "to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest."<sup>18</sup> The treaty terms do not, however, create an obligation upon the United States or a state to protect water quality for uses as they would have occurred at the time

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<sup>11</sup> EPA. 1984. *EPA's Policy for the Administration of Environmental Programs on Indian Reservations*. Dated November 8, 1984, and signed by William Ruckelshaus, Administrator, U.S. Environmental Protection Agency. Available at: <http://www.epa.gov/indian/pdf/indian-policy-84.pdf>.

<sup>12</sup> See *United States v. Mitchell*, 463 U.S. 206, 224 (1983).

<sup>13</sup> COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 433 (2005 ed.).

<sup>14</sup> *United States v. Navajo*, 556 U.S., 129 S.Ct. 1547, 1552 (2009) (citing *United States v. Navajo*, 537 U.S. 488, 506 (2003)).

<sup>15</sup> *Gros Ventre Tribe v. U.S.*, 469 F.3d 801, 812 (9th Cir. 2006), *cert denied*, *Gros Ventre Tribe v. U.S.*, 128 S.Ct. 176 (mem.) (2007), (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)).

<sup>16</sup> See, e.g., *Sohappy v. Smith*, 302 F.Supp 899, 904 (D.C.OR 1969) (citing Treaty of June 9, 1855, with the Yakima Tribe (12 Stat. 951); Treaty of June 25, 1855, with the Tribes of Middle Oregon (12 Stat. 963); Treaty of June 9, 1855, with the Umatilla Tribe (12 Stat. 945); and Treaty of June 11, 1855, with the Nez Perce Tribe (12 Stat. 957)).

<sup>17</sup> See, e.g. *U.S. v. Washington*, 759 F.2d 1353 (9th Cir. 1985).

<sup>18</sup> *U.S. v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007) (not reported in F.Supp.)

of treaty signing; and such uses and standards are beyond the CWA requirement to protect uses as they existed on or after November 28, 1975.<sup>19</sup>

In the case presently before us, there is neither a treaty obligation to protect fish consumption at levels present at the time the treaties were signed, nor is there a provision under statute or in regulation which requires EPA to require a state to take such action. Therefore, EPA does not have a federal trust responsibility to require Oregon to set water quality criteria that protect for consumption at the rates present at the time of treaty-signing.

### ***B. EPA has Consulted with Tribal Governments***

EPA's Indian Policy specifies that EPA will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments. EPA generally provides special consideration to tribal interests in making Agency decisions and involves tribal governments in decisions affecting reservation lands.<sup>20</sup> In order to accomplish this, EPA offers potentially affected Tribes an opportunity to consult on pending actions and encourages cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern.

EPA has conducted extensive Tribal outreach and consultation on this matter. These efforts are outlined in a separate memorandum and may be found in the administrative record for this action. Consistent with EPA's Indian Policy, all input received from Tribes was considered when making this decision. The results of this review and analysis, along with the basis for EPA's action on Oregon's 2004 new and revised human health criteria, are provided in EPA's *Technical Support Document* for this action.

### ***C. Oregon Can Revise its Fish Consumption Rate if Tribal Fish Consumption Increases***

EPA's regulations require that the State "from time to time, but at least once every three years" hold public hearings for reviewing and, as appropriate, modifying applicable water quality standards (40 CFR § 131.20(a)). If new information becomes available that indicates fish consumption rates have increased, the State of Oregon can, and should, consider this information during a future review and update of their water quality standards. If an environmental group, a Tribe or any other party has data they desired to have considered during such a review, they may submit it to the state of Oregon during their public process.

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<sup>19</sup> See 40 CFR §131.3(e).

<sup>20</sup> See Memorandum from EPA Administrator Lisa P. Jackson to All EPA Employees, July 22, 2009, Subject: EPA Indian Policy. Available at: <http://www.epa.gov/indian/pdf/reaffirmation-memo-epa-indian-policy-7-22-09.pdf>.

### ***D. Summary***

The CWA and EPA's regulations do not require that Oregon protect fish consumption to the levels that occurred at the time the treaties were signed. Further, the federal trust responsibility does not expand EPA's authority under the CWA. EPA has satisfied the trust responsibility in taking action on Oregon's 2004 human health criteria. In the event that rates of fish consumption increase over time, tribes, or any other party, have the opportunity to present data to support an increase in the fish consumption rate during Oregon's triennial review process and the State can adopt revised human health criteria to reflect these increased fish consumption rates.